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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

SEPTEMBER BARON, Plaintiff and Appellant, v. COUNTY OF ORANGE et al., Defendants and Respondents.	G046620 (Super. Ct. No. 30-2010-00410598) O P I N I O N

Appeal from a judgment and orders of the Superior Court of Orange County, Linda S. Marks, and Richard W. Luesebrink (retired judge of the Orange County Super. Ct., assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.), Judges. Affirmed in part and reversed in part.

Law Offices of Nizinski & Vetchein, Loren Nizinski, Robert Vetchein and Beverly Swanson, for Plaintiff and Appellant.

Lynberg & Watkins, S. Frank Harrell and Scott D. Danforth, for Defendants and Respondents.

INTRODUCTION

September Baron appeals from a judgment dismissing her claims against the County of Orange, the Orange County Sheriff's Department, and an individual deputy sheriff for personal injuries, after the court sustained respondents' demurrer to her first amended complaint. In her complaint, Baron had alleged four state-law causes of action and one cause of action for federal civil rights violations under 42 U.S.C. section 1983. The trial court dismissed her claims because she had not filed her complaint within the time limit specified in Government Code section 946.6, subdivision (f).

We affirm in part and reverse in part. Baron did indeed miss the filing deadline for her state-law causes of action, by a considerable margin. Her cause of action for civil rights violations, however, is not subject to this state-law condition. The court erroneously dismissed this last cause of action when it dismissed the other four. We therefore return the matter to the trial court for further proceedings on this lone claim.

FACTS

On June 9, 2009, deputies from the Orange County Sheriff's Department responded to a 911 call from Baron's sister after she and Baron had an argument, during which Baron threatened her with a fireplace poker. Baron was arrested and taken into custody. She alleged she was badly injured during the arrest.

Baron wanted to sue the County of Orange, the Orange County Sheriff's Department, and the arresting deputy for assault and battery, negligence, negligent hiring, and infliction of emotional distress under California law. She also wanted to allege a cause of action for violation of her civil rights under 42 U.S.C. section 1983. She failed, however, to present her claim to the relevant public entities within six months of the accrual of her causes of action, as required by Government Code section 911.2, subdivision (a). Her request under section 911.4 to file a late claim was denied. Accordingly, she moved in superior court for relief under section 946.6.

The court granted Baron's petition on October 27, 2010, and gave her leave to file her complaint. Under Government Code section 946.6, subdivision (f), Baron had 30 days after the court made its order to file her complaint – until November 26, 2010.

Baron did not file her complaint until January 5, 2011. Respondents demurred to the complaint, on the grounds that the first four (state-law) claims were barred as untimely filed and the last, federal, cause of action was not pleaded with the requisite particularity. The court sustained the demurrers to the first four causes of action, because of Baron's failure to file her complaint on time, and overruled the demurrer to the federal cause of action. The court gave Baron leave to amend to allege facts showing why the time-bar of Government Code section 946.6 should not apply.

Baron filed her first amended complaint, alleging the court ordered the complaint filed, but the clerk failed to follow this order. Respondents demurred again, and, after ordering supplemental briefing on the limitations issue, the court sustained the demurrer and dismissed the entire action.[1]

Respondents served a proposed order dismissing the first four causes of action on December 13, 2011. Baron did not respond within five days; accordingly respondents served a notice on December 19 that the order was deemed approved. (See Cal. Rules of Court, Rule 3.1312(a).) Respondents then served a second proposed order, this one dismissing the entire action, on December 30, 2011. Baron objected to this one, but the objection was not served until January 6, 2012, two days late.[2] The court signed the second proposed order on January 10, 2012, dismissing the entire action.

DISCUSSION

On appeal from the dismissal of an action after a demurrer has been sustained, we exercise our independent judgment to determine whether the complaint

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[1] Respondents also filed a motion to strike, which was directed solely at certain allegations of the civil rights cause of action. The court deemed the motion to strike moot after sustaining the demurrer.

[2] The record does not indicate when the objection was filed with the court.

states a cause of action under any theory. (*City of Morgan Hill v. Bay Area Air Quality Management Dist.* (2004) 118 Cal.App.4th 861, 869.) We accept as true all properly pled material facts, all facts that may be inferred from the allegations, and all matters that can be judicially noticed. (*Id.* at pp. 869-870.) A demurrer on limitations grounds is proper if the grounds appear on the face of the complaint or are revealed in matters that can be judicially noticed. (*Friends of Shingle Springs Interchange, Inc. v. County of El Dorado* (2011) 200 Cal.App.4th 1470, 1482.)

I. The State-Law Causes of Action

Government Code section 946.6, subdivision (f), requires a plaintiff who has been granted relief from a late claim against a public entity to file suit within 30 days after the court orders relief. Complying with this time period is mandatory; courts do not have the power to allow claims to be filed beyond the 30-day limit or to accept "'substantial compliance'" with the statute. (See *Ard v. County of Contra Costa* (2001) 93 Cal.App.4th 339, 343, 346; *Fritts v. County of Kern* (1982) 135 Cal.App.3d 303, 305-306 [plaintiff one day late in filing complaint; demurrer sustained].

Baron does not dispute the application of the code section to the state-law causes of action of the first amended complaint. Instead, she maintains (1) the complaint was actually filed on October 27, 2010, the date of the hearing on her petition for relief, or (2) respondents should be equitably estopped from asserting a time-bar. We deal with each argument in turn.

A. The October 27, 2010 Hearing

The hearing on October 27 dealt with Baron's petition for relief under Government Code section 946.6 for failure to present a timely claim. The trial court granted the petition, stating, "Your petition for leave is granted." Baron's counsel then asked the court, "Just procedurally, we filed a proposed complaint. Does that get filed now automatically, or how does that work?" The judge responded, "Well, you two [counsel for the parties] talk about it." "Well," observed Baron's counsel, "it hasn't

actually officially been filed because it was attached as a proposed complaint to the motion – to the petition, and now the petition has been granted." "Right," said the judge. "So you figure out what to do next." Baron's counsel than asked the judge to order that the complaint may be filed. "I think that's inherent in my ruling, but if not, you have leave to file your complaint," replied the judge.

From this exchange, we can only conclude the court was granting Baron leave – that is, permission – to file the complaint. But that is all. A party petitioning the court under Government Code section 946.6 is seeking relief from the prohibition of section 945.4, which forbids filing suit against a public entity "until a written claim . . . has been presented to the public entity and has been acted upon by the board, or has been deemed to have been rejected by the board . . . ." (Gov. Code, § 945.4.) The petition does not encompass filing the complaint itself. And the judge's comments at the October 27 hearing cannot be construed as ordering the clerk to file the complaint. He was quite careful not to make such an order and clearly put the responsibility on counsel.

Baron's counsel explicitly acknowledged that merely filing the petition did not equal filing the complaint. He tried to get the judge to tell him what to do, but the judge put the onus back on him: "So you figure out what to do next." The only relief the court granted was the relief Baron sought through her petition – leave to file the complaint. The actual filing, however, is a separate action, which would properly occur *after* the court granted the relief requested under Government Code section 946.6.

Baron did not file a complaint on October 27, 2010. She filed a petition to which a *proposed* complaint was attached on September 22, 2010. The court gave her leave to file the proposed complaint, but she did not do so until January 2011. This was well beyond the 30-day limit for filing suits after permission has been granted to do so.

B. Equitable Estoppel

Baron argues her complaint should be saved under the principles of equitable estoppel. The elements of an estoppel are: (1) a representation or concealment of material facts known to the party to be estopped; (2) the other party's ignorance of the true facts; (3) the intention of the party to be estopped that its conduct be acted upon; and (4) the other party's reliance to its prejudice. (*Simmons v. Ghaderi* (2008) 44 Cal.4th 570, 584; *Cal. Cigarette Concessions v. City of L. A.* (1960) 53 Cal.2d 865, 869.)

With commendable frankness, Baron informs us that the party to be estopped in the first instance is the trial court, with respondents secondarily liable for trying to benefit from the trial court's activities. Even if we could apply estoppel to a trial court – and Baron gives us no authority for this extraordinary idea – the court did nothing to mislead Baron. It granted her petition for relief. It then told her counsel to figure out the next step for himself, hinting that a stipulation with opposing counsel might be a good idea. It made explicit what was implicit in the order by telling her counsel he had leave to file the complaint. It made no representations and concealed no facts of which Baron was unaware.

Similarly, estoppel will not work against respondents. Baron alleged no representations made by respondents to her. They never said anything to lead her to believe that filing the petition with a proposed complaint attached was good enough. Baron cites no material facts known to respondents of which she was ignorant. And she describes no actions that she took in reliance on any statements or concealments by respondents. There is no basis for equitable estoppel here.[3]

Because we find that the first four cases of action were not filed within 30 days of the trial court's order, as required by Government Code section 946.6,

[3] It is also clear from the acknowledged facts that Baron cannot state any additional facts that would equitably estop respondents; therefore, further amendment would be futile.

subdivision (f), and equitable estoppel does not apply, we do not reach the issue of whether the causes of action were properly pleaded.

II. The Federal Cause of Action

State courts have jurisdiction to hear a cause of action brought under 42 U.S.C. section 1983, and a plaintiff need not file a claim under Government Code section 911.2 before bringing such an action. (*Williams v. Horvath* (1976) 16 Cal.3d 834, 837, 842; see also *Bach v. County of Butte* (1983) 147 Cal.App.3d 554 [state courts have jurisdiction to hear section 1983 claims].)

Baron argues her civil rights cause of action was properly pleaded, and respondents do not dispute this point. Although respondents do not forfeit their opposition by failing to address a contention (see *Wall Street Network, Ltd. v. New York Times Co.* (2008) 164 Cal.App.4th 1171, 1178, fn. 3), we think their silence on the merits of this argument is significant.

We agree with the trial court's determination after the first demurrer that Baron adequately pleaded a cause of action under 42 U.S.C. section 1983. "The 'two essential elements' to a claim under section 1983 are '(1) whether the conduct complained of was committed by a person acting under the color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States.' [Citation.]" (*Irwin v. City of Hemet* (1994) 22 Cal.App.4th 507, 516.) Baron alleged that the conduct complained of was committed by an Orange County deputy sheriff, clearly a person acting under color of state law. She also alleged facts that, if proven, might qualify as use of excessive force by the deputy. This would amount to depriving her of her Fourth Amendment rights. (See, e.g., *Smith v. City of Fontana* (9th Cir. 1987) 818 F.2d 1411, 1416, overruled on other grounds in *Hodgers-Durgin v. De La Vina* (9th Cir. 1999) 199 F.3d 1037.)

Respondents argue the trial court could exercise its inherent powers to dismiss the last cause of action for "persistent procrastination and delay." Trouble is, the

court gave no indication whatsoever that it was penalizing Baron in this drastic way – and without notice or opportunity for hearing – for filing her complaint less than a month-and-a-half late. On remand, respondents can, if they so desire, bring this subject up with the trial court and, if necessary, develop a record that would support dismissing the fifth cause of action for reasons other than the time limitation imposed by Government Code section 946.6, subdivision (f). But at this point there is no indication that was the court's intent.

DISPOSITION

The judgment of dismissal is reversed. The order sustaining respondents' demurrer to the first four causes of action of the First Amended Complaint without leave to amend is affirmed. The order sustaining the demurrer to the fifth cause of action is reversed. The parties are to bear their own costs on appeal.

BEDSWORTH, J.

WE CONCUR:

O'LEARY, P. J.

ARONSON, J.